

In the Matter of License No. A-11761
Issued To: TIMOTHY L. MALONE

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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TIMOTHY L. MALONE

This appeal comes before me by virtue of 46 United States Code 239 (g) and 46 Code of Federal Regulations 137.11-1.

On June 30, 1949, a hearing of the charge of "Negligence" preferred against Timothy L. Malone, holder of License No. A-11761, was held by an Examiner of the United States Coast Guard at Baltimore, Maryland. The charge was supported by one specification alleging "while serving as pilot on board a merchant vessel of the United States, the SS KETTLE CREEK, under authority of your duly issued license, did, on or about 8 April, 1948, navigate said vessel at an immoderate speed through an area frequented by other vessels during a period of limited visibility in fog, the result of which caused the SS KETTLE CREEK to collide with the Norwegian Motor Vessel GRANVILLE." The charge and specification were drawn as a result of an investigation into a collision, which occurred on April 8, 1948 in Chesapeake Bay, Maryland between the vessels KETTLE CREEK and GRANVILLE.

Appellant was at the time of the collision employed as pilot of the KETTLE CREEK pursuant to the requirements of R.S. 4401 (46 U.S.C. 364). Appellant, appearing with counsel, pleaded not guilty to the charge and supporting specification. The investigating officer called as his witness Lawrence C. Schmidt who, at the time of the collision, was employed as compulsory State pilot on the Norwegian Motor Vessel GRANVILLE pursuant to section 16, Article 74, Annotated Code of Maryland. Mr. Schmidt testified that at 7:55 A.M. on April 8, 1948, the GRANVILLE passed Tangier Light Buoy, outward bound; that visibility at that time was less than a mile; that the vessel was stopped at Tangier Buoy; that at 7:58 A.M. the vessel was at slow speed; that the visibility became progressively thicker until it was reduced to two ship lengths; and that the vessel's speed was reduced.

Mr. Schmidt further testified that at about 8:22 A.M. a fog whistle was heard, which later turned out to be that of the KETTLE CREEK; that at 8:27 A.M. the KETTLE CREEK was sighted two points on the port bow of the GRANVILLE approximately 900 feet away; that he estimated the speed of the KETTLE CREEK just before the collision to be 14 knots; that the danger signal was sounded; that he ordered the quartermaster of the GRANVILLE to put the wheel starboard; that it appeared the KETTLE CREEK was headed for the stern of the GRANVILLE; that the engines of the GRANVILLE were put full ahead and her wheel starboard; that when it appeared the KETTLE CREEK was swinging toward the bow of the GRANVILLE the engines of the GRANVILLE were put full astern; and, that in a matter of seconds after the engines of the GRANVILLE were full astern the bows of the two vessels collided. Mr. Schmidt further testified that the bow of the GRANVILLE struck the KETTLE CREEK's bow just around her anchor on the starboard side; that the collision caused a fire on the KETTLE CREEK; and that the GRANVILLE stood by until 9:55 A.M. when the KETTLE CREEK advised by radio that the fire was under control.

Upon completion of Mr. Schmidt's testimony and cross-examination, the investigating officer advised that he had no further witnesses but offered into evidence pretrial statements (which he, in error, identified as "depositions") taken from the master and four members of the crew of the KETTLE CREEK and the master and radio operator of the GRANVILLE. Defense counsel objected to the admission of these as evidence. The investigating officer revealed that efforts to locate the persons who had given the pretrial statements, for the purpose of subpoenaing them as witnesses, had been unsuccessful. The Examiner overruled the objections of defense counsel and conditionally admitted the statements into evidence. The statement of Jacob Johannessen, Master of the KETTLE CREEK, indicated that the pilot boarded the KETTLE CREEK at 5:00 A.M. at Cape Henry; that visibility at that time was four to five miles; that he turned in at 6:00 A.M. with orders to be called if the weather "shut in"; that he was called just before 7:15 A.M.; that he came on the bridge at 7:15 A.M. while the vessel was off Wolff Trap; that the visibility at that time was approximately 1-1/2 miles and the speed of the vessel 90 revolutions; that fog signals were being blown; that when the watches were changed at 8:00 A.M. the visibility was still 1-1/2 miles and the speed of the vessel 90 revolutions; that a vessel was sighted about 15 to 20 degrees off the starboard of the KETTLE CREEK about 8:20 A.M.; and that he had no prior knowledge of the presence of the vessel which was sighted. Captain Johannessen further stated that he had not looked into the radar scope; that he observed Pilot Malone scanning the scope; that at 7:15 A.M., when he came on the bridge, he advised Pilot Malone that he could reduce the vessel's speed if he felt it was necessary; that the Pilot replied "we're doing very nicely"; that when the GRANVILLE was sighted he ordered the vessel stopped.

The statement of Samuel W. Fish, Jr., Chief Mate of the KETTLE CREEK, indicated that he was on watch at 5:00 A.M. on April 8, 1948 when the Pilot boarded the vessel; that fog conditions prevailed at that time with visibility approximately three miles; that the vessel was blowing fog signals; that at 7:00 A.M., in accordance with the Master's orders, he called Captain Johannessen because of the reduction in visibility; that there was no reduction in the speed of the KETTLE CREEK; that dense fog prevailed at 8:00 A.M.; that there was no reduction in speed from full-ahead. The statement of Frank H. Hunt, A.B. aboard the KETTLE CREEK, indicated that he was on lookout duty between 8 and 9 A.M. on the morning of April 8, 1948; that he heard the fog whistle of a vessel which subsequently developed to be the GRANVILLE; that almost immediately after hearing the fog whistle the GRANVILLE broke out of the fog; that from one to three minutes later the collision occurred. The statement of Wilton E. McLendon, A.B. on the KETTLE CREEK indicated that he was serving as quartermaster of his vessel at 8:00 A.M. on April 8, 1948; that the KETTLE CREEK was blowing fog signals; that the lookout reported twice to the bridge that he heard a fog signal ahead; that he saw a vessel break through the fog about two shiplengths ahead, approximately 5 to 10 degrees on the starboard bow of the KETTLE CREEK; that he overheard the conversation between the Master and the Pilot as to a vessel which appeared on the radar scope, that the Pilot called off the diminishing distances between the KETTLE CREEK and the vessel on the radar scope. The statement of Lawrence K. Pierce, Third Mate, SS KETTLE CREEK, indicated that he was on duty on the 8-12 watch on April 8, 1948; that the visibility at that time was approximately two shiplengths; that fog signals were being blown manually; that the pilot was using the radar continually; that there was no reduction of the vessel's speed; that the GRANVILLE came out of the fog 15 degrees on the starboard bow of the KETTLE CREEK approximately two lengths away; that the collision occurred approximately 10 seconds later; that the pilot was standing beside the radar at the time of the collision. The statement of Maurice Powell, Radio Operator, MV GRANVILLE, indicates that he came out on the port side of his vessel shortly after 8:00 A.M.; that he saw the KETTLE CREEK coming out of the fog on an approximately 45-degree bearing about three shiplengths away; that he first saw the bow wave of the KETTLE CREEK and then the bow; that 35 seconds later the collision occurred; that the GRANVILLE was blowing fog signals; and, that he heard the fog signals of the KETTLE CREEK.

The statement of T.A. Tveit, Master, MV GRANVILLE, indicated that his vessel departed from Baltimore, Maryland, on April 7, 1948; that at midnight the vessel was required to anchor because of fog conditions; that at 5:57 A.M. on April 8, 1948 the vessel resumed her voyage with a visibility of approximately three to four miles; that when his vessel passed Tangier Buoy it was proceeding at approximately two knots; that he instructed the Pilot to stop the GRANVILLE at once if he heard any fog signals; that he heard the fog whistle of the KETTLE CREEK prior to seeing her; that he first saw the KETTLE CREEK approximately two shiplengths, three to four points off the port bow; that as soon as the KETTLE CREEK was sighted the danger signal was blown by the GRANVILLE; that the GRANVILLE'S engines were put full ahead in anticipation that the two vessels would pass port to port; that when it was seen that the KETTLE CREEK was attempting to cross the bow of the GRANVILLE, the GRANVILLE'S engines were placed full astern.

Subsequent to the submission of the pretrial statements, the investigating officer closed this case. The defense made no statement, introduced no witnesses, and offered no other evidence. The Examiner, on his own motion, raised the question of the jurisdiction of the Coast Guard over the license of Pilot Malone in the case under consideration, and requested the investigating officer to furnish him with additional information. The defense objected on the ground that the investigating officer had closed the case. The objection was overruled, and the investigating officer indicated that the KETTLE CREEK on April 8, 1948 was operating under Temporary Enrollment No. 445 issued at Wilmington, Delaware on February 28, 1938.

There was no further evidence offered, and after closing statements, the Examiner found the charge and supporting specification "proved" and ordered that License No. A-11761 and all other valid licenses held by Timothy L. Malone be suspended for a period of two months, from June 30, 1949. The Examiner, upon being advised that an appeal was to be taken, issued a temporary license to the appellant and modified his order of suspension to the extent that the suspension would become effective on the date of the final determination of the case, if the said suspension was affirmed.

From that order this appeal has been taken and it is contended (a) that the Examiner erred in permitting the introduction of evidence of jurisdiction subsequent to the closing of the government's case; (b) that the admission of pretrial depositions was error in that they were not taken as prescribed either by Coast Guard regulations or in accordance with the Rules of Civil Procedure; (c) that the findings of fact and conclusions of the Examiner were erroneous in that the collision resulted solely from the altering of the course of the GRANVILLE after hearing the fog signal of the KETTLE CREEK forward of the GRANVILLE'S beam, but before ascertaining the position of the KETTLE CREEK; and

(d) that the negligence chargeable to the appellant was not solely confined to him since the Master of the KETTLE CREEK was on the bridge for more than one hour before the collision and permitted the speed of the KETTLE CREEK to remain unchanged.

OPINION

The first issue raised by the appellant is as to the jurisdiction of the Coast Guard to administratively try the appellant for his alleged negligence while serving aboard the SS KETTLE CREEK under his Federally issued license. The contention of the appellant that the Coast Guard has no administrative control over State compulsory pilots serving on registered vessels of the United States has no bearing on the facts in the case before me as the KETTLE CREEK was a coastwise vessel of the United States, not under registry, and was required by the provisions of R.S. 4401 to be in charge of a Federally licensed pilot at the time of the collision. The appellant was, therefore, serving aboard the KETTLE CREEK by virtue of his holding of a Federal, rather than a State, pilot's license. Hence he was serving aboard the KETTLE CREEK under the authority of his license within the purview of R.S. 4450, as amended.

The second issue raised by the appellant in connection with the jurisdiction of the Coast Guard was that the Examiner could not, on his own motion, require production of proof of jurisdiction of the Coast Guard subsequent to the closing of the Coast Guard's case. The Supreme Court stated that it is the duty of every court by its own motion to inquire into the matter of its jurisdiction and to be careful that it exercises no powers save those conferred by law. Reed v. U.S., 211, 529; Minnesota v. Hitchcock, 185 U.S. 373; Texas and P.R. Co. v. Gulf, C. and S.F.R. Co., 270 U.S. 268; Grignon v. Astor, 2 How. 319. The examiner in the instant case could, at any time during the conduct thereof, satisfy himself, or require the investigating officer to satisfy him, that the subject matter of the case over which he was presiding was one within the jurisdiction of the Coast Guard as defined by R.S. 4450, as amended, and affected by Reorganization Plan No. 3, 1946.

The second major issue raised by the appellant was that the admission of the pretrial statements as evidence was error. Federal administrative bodies which have been given statutory power to make inquiries and conduct administrative trials are not to be narrowly constrained by technical rules as to admissibility of proof. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143; ICC v. Baird, 194 U.S. 25, 44. To assimilate the relation of a hearing under R.S. 4450, as amended, and the courts to the relationship between lower and upper courts is to disregard the origin and purpose of the movement for administrative regulation. I am fully cognizant of the desirability of affording the person accused the opportunity of confronting the witnesses against him with the right of cross-examination.

I am also cognizant of the desirability of having all witnesses present before the Examiner in order that he may judge their credibility. In the instant case, however, the appellant was not only given the charge and specification prior to the taking of the pretrial statements but he was also afforded the right to have representation by counsel, to introduce witnesses and to cross-examine. It is true that the statements taken at the pretrial investigation do not comply with the requirements of existing Coast Guard regulations or the Rules of Civil Procedure with respect to depositions. However, since there has been no abridgement of appellant's constitutional rights in proceedings of this type, I do not feel that under the decisions of the Supreme Court, as cited herein, the Examiner erred in admitting the statements as exceptions to the hearsay rule. Consolidated Edison Co. et al. v. N.L.R.B., 305 U.S. 197, 229, 230. This is particularly true in view of the fact that all of the witnesses were unavailable and beyond the subpoena range of the Coast Guard at the time of the hearing.

The fourth issue raised by the appellant is to the effect that he is without fault and that the sole cause of the collision was the action of the persons in charge of the navigation of the MV GRANVILLE in altering the course upon hearing the fog signals forward of the GRANVILLE, but without first ascertaining the location of the vessel from which the fog signals came. There is nothing in the record of the case to substantiate this contention. The charge against the appellant is one of negligence, supported by a specification that he navigated the KETTLE CREEK at an immoderate speed during a period of limited visibility in fog, the result of which caused the collision. The record indicates that fog of varying densities existed from the time the appellant boarded the vessel at Cape Henry, Va. on the morning of April 8, 1948 until the time of the collision. The record further indicates that the KETTLE CREEK was operated at speeds varying between 14-1/2 to 15 knots during this entire period despite the existence of limited visibility. The fact that the vessel was equipped with a radar did not excuse the pilot from complying with the statutory requirements of Article 16 of the Inland Rules of the Road (33 U.S. 192) to the effect that "Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." The evidence in the record clearly indicates that, despite the fact that a vessel was observed in the radar scope sometime before the collision, plus the two reports of the lookout of the KETTLE CREEK of the hearing of a fog signal, the speed of the KETTLE CREEK was not reduced until collision was inevitable.

I agree with the conclusion of the Examiner that the speed of the KETTLE CREEK as it approached the GRANVILLE was immoderate in the circumstances and that such immoderate speed resulted in a cause of the collision. I do not believe it is necessary for the purpose of this appeal to determine whether or not any of the maneuvering on the part of the GRANVILLE could be considered to have contributed to the cause of the collision.

The last issue raised by the appellant is that the suspension ordered in his case is a more severe punishment to that given to the Master of the KETTLE CREEK who was on the bridge at least an hour before the collision. It is my opinion that the responsibility of the appellant in the instant case was greater than that of the master. The appellant holds himself out to be a person trained in the piloting of vessels and one who is thoroughly familiar with the conditions which exist on the Chesapeake Bay at all times. The master of the KETTLE CREEK indicated some apprehension as to the speed which his vessel was travelling and gave the appellant the authority to slow the vessel down if he deemed it necessary. Despite the existing conditions the appellant did not slow the vessel down and the collision resulted. In view of the foregoing, I find nothing to warrant my intervening in this case.

CONCLUSION AND ORDER

It is ordered and directed that the decision and order of the Coast Guard dated June 30, 1949 should be, and it is AFFIRMED.

MERLIN O'NEILL
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D.C., this 29th date of Sept, 1949.